

Updates on being an expert witness (Part I)

“An expert is one who knows more and more about less and less.”

— Nicholas Murray Butler

Appraisers as experts

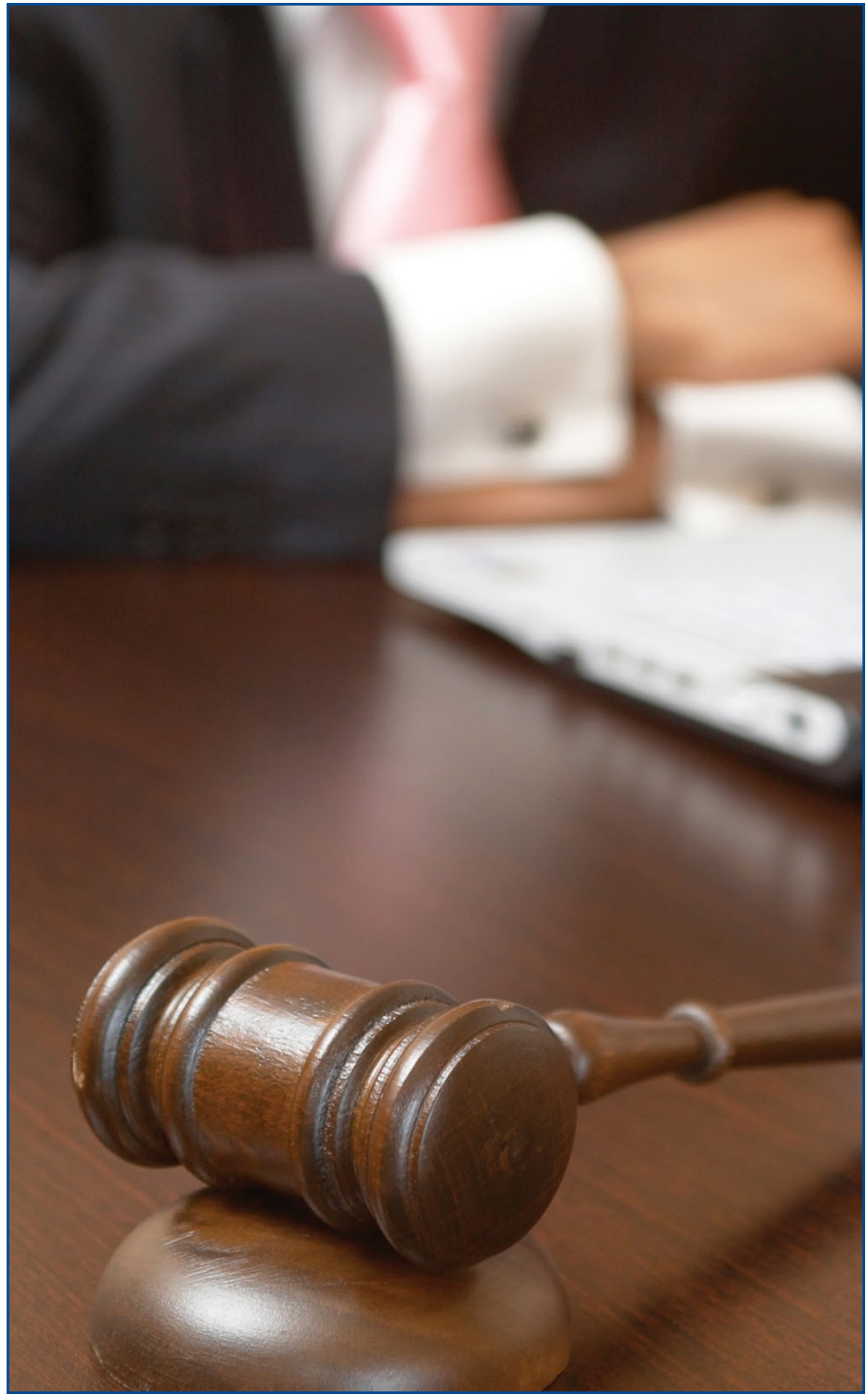
By nature, appraisers are experts on a number of topics. Every appraisal then is an expert report. Many appraisers make a decent living on providing evidence in Canadian courts. Recently, Ontario has changed its *Rules of Civil Procedure* to provide for the more complicated and particular role of experts in litigation matters. Appraisers should be aware of what the new rules provide, as their testimony will be governed by them. While this article largely pertains to the law of Ontario and experts, it has relevance in the other common law provinces of Canada as well as in Quebec, as the law sets out basic standards that should be employed by appraisers in their work.

Ontario Rules

New Rules pertaining to civil procedure and experts came into effect in Ontario on January 1, 2010.

Rule 4 provides:

4.1.01 (1) It is the duty of every expert engaged by or on behalf of a party to provide evidence in relation to a proceeding under these rules,
(a) to provide opinion evidence that is fair, objective and non-partisan;
(b) to provide opinion evidence that is related only to matters that are within the expert's area of expertise;
and



(c) to provide such additional assistance as the court may reasonably require to determine a matter in issue.

(2) The duty in subrule (1) prevails over any obligation owed by the expert to the party by whom or on whose behalf he or she is engaged.

The minimum content of a report is provided by Rule 53:

53.03(2.1) A report provided for the purposes of subrule (1) or (2) shall contain the following information:

1. The expert's name, address and area of expertise.
2. The expert's qualifications and employment and educational experiences in his or her area of expertise.
3. The instructions provided to the expert in relation to the proceeding.
4. The expert's opinion respecting each issue and, where there is a range of opinions given, a summary of the range and the reasons for the expert's own opinion within that range.
5. The nature of the opinion being sought and each issue in the proceeding to which the opinion relates.
6. The expert's reasons for his or her opinion, including,
 1. a description of the factual assumptions on which the

opinion is based,

2. a description of any research conducted by the expert that led him or her to form the opinion, and

3. a list of every document, if any, relied on by the expert in forming the opinion.

7. An acknowledgement of expert's duty (Form 53) signed by the expert.

An expert is restricted as to what he or she can testify to under Rule 53 which provides:

- (3) An expert witness may not testify with respect to an issue, except with leave of the trial judge, unless the substance of his or her testimony with respect to that issue is set out in,
- (a) a report served under this rule; or
 - (b) a supplementary report served on every other party to the action not less than 30 days before the commencement of the trial.

Judges' impressions and impressing the judge – the function of the expert

"I am not aware that the expert is an expert in logic, and I do not understand that the expert has a corner on the market of what conclusions are logical and which are not."

– Justice Osborn

"The function of the expert witness is

to provide for the judges, and sometimes the jury,

- *an opinion as to the significance of, or the inference which may be drawn from,*
- *proved facts,*
- *in a field in which the expert possesses special knowledge and experience,*
- *going beyond that of the trier of fact."*

(M. F. Harrington 'Expert Witnesses: The Good, The Bad and The Ugly' (Canadian College of Construction Lawyers 6th Annual Conference: May 29, 2003))

The Supreme Court of Canada has provided that courts should only allow an expert to provide opinion evidence where the evidence is advanced with respect to matters that are beyond the common understanding of the judge or jury.

"An expert's function is precisely this: to provide the judge and jury with a ready-made inference which the judge and jury, due to the technical nature of the facts, are unable to formulate" . . .

The expert should be "a neutral observer who guides judges and juries through complicated evidence so that they can draw their own conclusions about the issues at hand." (Justice Dickson in R. v. Abbey)

For more on expert witnesses, read Part 2 of this article in Volume 55, Book 1, 2011 of Canadian Property Valuation magazine. 📄

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